No. 83-1550

IN THE

Supreme Court of the United States

October Term, 1983

LITTON SYSTEMS, INC.,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

REPLY MEMORANDUM ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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REPLY MEMORANDUM

Never before in the history of American jurisprudence has a criminal indictment been dismissed *twice* — by two different United States District Judges — for systematic abuse of fundamental Constitutional rights by the *same* prosecuting attorneys. As more fully developed in the Petition itself, the Fifth Circuit's reinstatement of a 1977 indictment for the *second* time has created a conflict within the circuits on fundamental issues in the administration of criminal justice and has sanctioned flagrant misuse of prosecutorial powers. Notwithstanding the extraordinary nature of the *undisputed* facts [1] and the important constitutional issues raised, the government has chosen not to respond substantively to Litton's Petition, but baldly asserts simply that the matter is interlocutory. In fact, this matter is not interlocutory in the technical sense, since the case was properly brought before the Court of Appeals from a final order of the District Court. Moreover, for all practical purposes, some of the issues raised by the Petition may well not survive a trial on the merits.[2]

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1. — At a time when the prosecutors admittedly had insufficient evidence to present even a *prima facie* case to a grand jury, they nevertheless used the *threat* of indictment in an effort to gain advantage in a civil controversy with Litton.

— Following transfer to the Southern District of Mississippi in December, 1978, the government failed to take any prosecutorial action whatsoever for over three and one-half years.

— During that three and one-half year period of deliberate failure to prosecute, four critical defense witnesses died and significant documentary evidence was lost or destroyed by the Navy.

2. As a practical matter, for example, the District Court's dismissal for want of prosecution pursuant to F.R. Crim. P. 48(b) is highly unlikely to be seriously considered after the case has been prosecuted to judgment. Since the purpose of Rule 48(b) is to codify the District Court's power to control their own dockets, there would be little chance that an appellate court would reverse a conviction solely on Rule 48(b) grounds after a trial already has been completed.

And, in any event, it is axiomatic that this Court may always review questions that are important to the overall administration of justice. The conflicts created by the Fifth Circuit's opinion in this extraordinary case should be resolved without further delay.

If Certiorari were denied, however, the government's unconscionable conduct, variously described as "reprehensible" and "intolerable" by the District Courts (*see* Petition at p.3), may *never* be scrutinized by this Court and a continuing course of prosecutorial abuse will be left forever without censure — inviting repetition in other cases throughout the nation. While post-trial relief may ultimately redeem the rights of a particular defendant, denial of pre-trial review would create a serious risk of permanent failure to rectify damage already done. A prophylactic remedy has become essential to convey the message that this Court will not tolerate persistently irresponsible behavior on the part of federal prosecutors.

The government insists that this Court turn a deaf ear to the defendant's plea for review because, it contends, Litton is "in precisely the same position it would have occupied if the district court had denied its motion to dismiss." (Gov't brief, p.2). But the District Court *granted* Litton's motion to dismiss, finding that the case had been *abandoned* by the prosecution and only resurrected after three and one-half years of deliberate failure to prosecute, solely in response to political pressure. The *appellate* process was invoked by the *government* — not Litton — in the Fifth Circuit just as it was previously in the Fourth Circuit. Having prevailed at an intermediate appellate level, the government now unfairly seeks for a second time to truncate the full appellate process that it initiated.

As the District Court observed in its Opinion dismissing the indictment for inexcusable and prejudicial delay (Petition at A-31), this Court has held that "an accused who does successfully establish a speedy trial claim before trial will not be tried." *United States v. MacDonald*, 435 U.S. 850, 861, n.8. If the

MacDonald admonition is to have any meaning, the fundamental questions raised here must be addressed *before* Litton is put to trial. To expose the defendant to the jeopardy of a trial in light of the extraordinary circumstances of this case would neither serve justice nor communicate an acceptable message to the prosecutors of this country.

Respectfully submitted,

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